LONG PINES ENTERPRISE SDN BHD

v.

BEERAN KUTTY YUSOF

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-904-1997]
15 DECEMBER 1997

LAND LAW: *Caveat - Application for removal - Land belonging to unadministered estate sold by a beneficiary thereto - Subsequent transfer by assignment to third party purchaser - Failure by third party to make necessary search - Another beneficiary lodged caveat and applied to declare transfer null and void - Whether beneficiary can lodge caveat - Whether caveat ought to remain pending disposal of application for declaration - Whether third party purchaser had actual or constructive knowledge of defect in vendor's title - Whether third party a bona fide purchaser for value without notice of any fraud*

LAND LAW: *Caveat - Who has caveatable interest - Whether beneficiary of unadministered estate has caveatable interest - Effect of private caveat - National Land Code 1965, ss. 322(2) & 323(1)*

LAND LAW: *Caveat - Private caveat - Application for removal of private caveat - Test to be applied - Who bears burden of proving whether caveat should or should not be removed - Which provisions to proceed under to remove private caveat - National Land Code 1965, ss. 326 & 327*

LAND LAW: *Sale of land - Land belonging to deceased's estate - Whether beneficiary under estate has locus standi or capacity to enter into contract to sell land belonging to estate - Whether such contract void - Whether purchaser obtained title by means of insufficient or void instrument - Whether purchaser's title not indefeasible - National Land Code 1965, s. 340(2)*

SUCCESSION: *Administrator - Sale of land - Whether administrator of estate can contract to sell land belonging to estate - Whether permission of court required*

LEGAL PROFESSION: *Duty of care - Failure to inquire at land office - Whether solicitor has duty to investigate title on behalf of client*

This was an application by the plaintiff to remove a private caveat lodged on a plot of land by the defendant. The material facts leading to this application are as follows. The estate of one Jamaluddin ('the estate') included a piece of land which was the subject matter of this application. A beneficiary of the estate, purporting to be lawfully capable of selling the land ('the purported vendor'), sold the land to one Chai and executed a sale and purchase agreement therefor. The sale of the land was dependent on the registration of the said land in the name of the purported vendor. The land was transferred to the purported vendor thereby effecting the sale of the land to Chai. Subsequently, Chai assigned all the rights and benefits of the sale and purchase agreements to the plaintiff thereby making the plaintiff the registered proprietor of the said land.

The defendant, another beneficiary of the estate, challenged the transfer of the land to the purported vendor alleging fraud and thus he lodged a caveat to safeguard his interest as a beneficiary to the said land. Further, the defendant had filed a separate application in the High Court ('the summons') for a declaration that the transfer of the land from the purported vendor to the plaintiff was null and void and ought to be struck off.

The issues before the court were whether a beneficiary of an estate has a caveatable interest in land forming part of the estate and whether the private caveat lodged ought to be removed.

Held:

[1] It is not only a person who has a right to a registrable interest in land that may enter a caveat against the land but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat. The defendant, at the worst, was only claiming a right to such title and it was sufficient for him to lodge that private caveat on the said land. There is nothing in s. 323(1)(a) of the National Land Code 1965 ('the NLC') that would prevent the defendant as a beneficiary of an unadministered estate from lodging the private caveat.

[2] Under s. 322(2) of the NLC, the effect of a private caveat is simply to prohibit the registration or entry on the register document of title of any dealing in the land. Thus, once a private caveat has been lodged, the prohibitory aspect of that private caveat cannot be overlooked.

[3] The test to decide whether a private caveat should remain on the register is whether on the evidence presented to the court, the caveator has shown that there is a serious question to be tried with regard to his claim to the property and if so, whether he has shown that on the balance of convenience, it would be better for the caveat to remain on the register until the trial of the action to determine his claim to the property.

[4] The onus of proof is entirely on the caveator to satisfy the court that the private caveat should remain on the register.

[5] The plaintiff must be imputed to know the terms and conditions of the sale and purchase agreement as all the rights and benefits of the agreement were assigned to it. Equity imposes on the plaintiff a high standard of diligence to make all the necessary searches which a prudent purchaser would do. As a purchaser of the said land by way of an assignment, the plaintiff had a duty to investigate the title. There was no evidence suggesting that the plaintiff had done this. Thus, the plaintiff must have acted by design to avoid knowledge of the true state of the title. As a result, the plaintiff cannot be described as a *bona fide* purchaser for value without notice of any fraud.

[6] The purported vendor had committed fraud when he obtained the order transferring the land wholly to him. The revocation or setting aside of the order will be done, if at all, after the summons had been disposed of by the court. The court has the jurisdiction to revoke or set aside the order of a tribunal over whom the court has superior jurisdiction and control particularly so when it was based on fraud.

[7] The defendant's caveat should remain on the register pending the disposal of the summons seeking a declaration that the transfer of the land was null and void and ought to be struck off. The effect of the caveat on the land would allow the court to adjudicate on the rival claims of the parties and, if the justice of the case requires, to remove the plaintiff from the register and substitute it with the deserving party – whoever that party may be.

[8] A beneficiary to an estate has no capacity in law to enter into an agreement for sale of land which formed part of the estate.

[8a] Since the purported vendor was merely a beneficiary, he had no *locus standi* or capacity to sell the land. Neither was the purported vendor competent to sell the land in his personal capacity. Therefore, that contract must be construed as void. This in turn renders the deed of assignment void *ab initio*.

[8b] Section 340(2) of the NLC expressly provides that the title of the registered proprietor whose registration was obtained by means of an insufficient or void instrument shall not be indefeasible. This was what happened to the plaintiff who got onto the register by means of an insufficient or void instrument. The balance of convenience or the justice of the case favoured the defendant. The private caveat should remain on the register pending the disposal of the summons.

[9] The defendant had a caveatable interest to lodge the private caveat and the evidence disclosed a serious question to be tried and, finally, the balance of convenience or the justice of the case favoured the private caveat to remain on the register pending the disposal of the summons.

Per curiam:

[1] Before the plaintiff entered into the deed of assignment, their solicitor must have made a search at the state registry to investigate the purported vendor's title. The failure on the part of an advocate and solicitor to make the necessary search may amount to negligence.

[2] An administrator of an estate cannot contract to sell land which formed part of the estate without permission of the court.

[3] A registered proprietor who wishes to remove a private caveat entered by a purchaser or any other person may either apply under s. 326 of the NLC to the registrar or under s. 327 of the NLC to the courts, whereas a purchaser pending registration who wishes to remove a private caveat entered by another person can do so by applying to the courts for its removal under s. 327 of the NLC.

[4] The court would grant relief to a party injured by another's fraud. The court would certainly grant relief where the conscience of the defaulting party demands it.

[Application dismissed.]

Cases referred to:
Abigail v. Lapin [1934] AC 491 ***(cit)***
Agra Bank v. Barry [1874] LR 7 HL 135 ***(foll)***
Barry v. Welder & Another [1914] 19 CLR 197 ***(refd)***
Birch Brothers Ltd v. Brown [1931] AC 605 ***(cit)***
Butler v. Fairclough & Another [1917] 23 CLR 78 ***(foll)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 ***(foll)***
Chow Yoong Hong v. Tai Chet Siang [1960] 26 MLJ 130 ***(foll)***
Damodran v. Choe Kuan Hin [1979] 2 MLJ 267 ***(cit)***
Damodaran v. Vasudeva [1974] 1 MLJ 128 ***(foll)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Faridah Mat Akir & Anor v. Sharifah Hj Ahmad & Ors [1976] 1 MLJ 30 ***(foll)***
Frazer v. Walker [1967] 1 AC 569 ***(not foll)***
Government of Malaysia v. Gurcharan Singh & Ors [1971] 1 MLJ 211 ***(foll)***
Hj Saud v. Hj Ahmad & Anor [1957] 23 MLJ 50 ***(foll)***
Jit Kaur v. Parl Singh [1974] 2 MLJ 199 ***(foll)***
Ingal v. Moran [1944] 1 All ER 97 ***(cit)***
Kasivisvanathan Chettiar v. Pereira [1976] 2 MLJ 110 ***(foll)***

Lee Ah Thaw & Anor v. Lee Chun Tek [1978] 1 MLJ 173 ***(dist)***
Leha Jusoh v. Awang Johari Hashim [1978] 1 MLJ 202 ***(foll)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 ***(foll)***
Mahadevan & Anor v. Patel [1975] 2 MLJ 207 ***(foll)***
Mohori Bibee v. Dhurmodas Ghose [1903] 30 Cal 539 ***(foll)***
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 ***(foll)***
N Vangedaselam v. Mahadevan & Anor [1976] 2 MLJ 161 ***(cit)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 ***(foll)***
Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218 ***(foll)***
Noordin Mat Dom v. Yahaya Mohamed Jalit [1952] 18 MLJ 17 ***(foll)***
Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224 ***(cit)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(foll)***
Ruhani Mohiat & Anor v. Abdul Karim Mat Ali & Anor [1993] 3 CLJ 524 ***(foll)***
Shropshire Union Railways v. R [1875] LR 7 HL 496 ***(cit)***
Syed Ibrahim Syed Abdul Rahman v. Liew Su Chin [1984] 1 MLJ 160 ***(cit)***
Tan Hee Juan By His Next Friend Tan See Bok v. Teh Boon Keat and Lai Soon [1934] MLJ vol III 96 ***(foll)***
Tan Heng Poh v. Tan Boon Thong & Ors [1992] 3 CLJ 1340 ***(dist)***
Tee Chin Yong v. Earnest Jeff [1963] 29 MLJ 118 ***(cit)***
United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No: 2) [1988] 3 MLJ 352 ***(cit)***

Legislation referred to:
Contracts Act 1950, ss. 10, 11
National Land Code 1965, ss. 120, 322(2), 323(1)(a), 326, 327, 340(2)(b)
Penal Code, ss. 465, 471
Prevention of Corruption Act 1961, s. 4(c)
Probate and Administration Act 1959, ss. 2, 39, 68
Indian Contract Act [India], ss. 2, 10, 11

Other sources referred to:
Muslim Law, Faiz Badruddin Tyabji, p 800
The Mahomedan Law of Inheritance, CH Withers Payne

For the plaintiff - Tho Kam Chew; M/s Gulam & Wong
For the defendant - Abdul Razak Ahmad; M/s Abdul Razak & Assoc

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

This was an application by the plaintiff by way of an originating summons in encl. 3 to remove a private caveat lodged by the defendant on 21 December 1995 on a piece of land held under Grant no: 17116, Lot 353, in the Township of Kota Tinggi comprising an approximate area of 3 acres 2 roods 28 poles ("the said land"). There was a chequered history behind the said land.

By an agreement of sale dated 2 November 1993 Awang bin Hj. M. Rambli ("Awang") who was described as an administrator of the estate of Sa'adon bin Hussein ("Sa'adon") sold the said land to Chai Chew Fatt ("Chai") for the purchase price of RM800,415. On the date of execution of that agreement of sale of the said land a sum of RM1,000 was paid while the balance of the purchase price was payable within three months from the date of issuance of title in favour of Awang. There was a special condition attached to that sale and purchase agreement; and for convenience it is now reproduced hereinunder:

Special Condition

> The Purchaser (referring to Chai) shall pay the balance 10% of the purchase price to the vendor (referring to Awang) upon obtaining the Letters of Administration from Land Office as Administrator and registered in favour of the vendor (referring to Awang) and the said 10% purchase price shall be held by M/s Lam & Lim as stakeholder until issuance of the original title.

It seemed that at the time Awang entered into that sale and purchase agreement for the sale of the said land to Chai, Awang was not the administrator of the estate of Sa'adon. Who was Awang in relation to the said land on 2 November 1993?

The defendant deposed an interesting affidavit-in-reply in encl. 5 that was affirmed on 15 October 1991. Briefly, he described himself as one of the beneficiaries of the estate of Jamaluddin bin Hussin who left the said land which was previously known as Grant 45534, Lot 353, Mukim Kota Tinggi. The beneficiaries of the estate of Jamaluddin bin Hussin ("Jamaluddin") were itemised by the kadi's office of Kota Tinggi, Johore ("the first letter") together with their respective shares entitlement as reflected in exhibit "BKY 1 B" of encl. 5 and it is instructive to reproduce them here:

Awang bin Ali	...	474320 share
Abu Bakar bin Ali	...	502040 share
Beeran Kutty bin Yusof	...	42240 share
Kadir bin Yusof	...	42240 share
Ahmad bin Yusof	...	42240 share
Mariamah bte Yusof	...	21120 share
Ahmad bin Abdul Ghani	...	62755 share
Azman bin Ahmad	...	75306 share
Jamal bin Ahmad	...	75306 share

Exhibit "BKY 1C" of encl. 5 was another letter from the kadi's office of Kota Tinggi, Johore ("the second letter") and there it categorised the names of the beneficiaries and their shares to the estate of Jamaluddin and they are now reproduced hereinunder:

Faridah bte Ahmad	...	37653 share
Yahya bin Mat Samat	...	62755 share
Anwar bin Yahya	...	34230 share
Amran bin Yahya	...	34230 share
Ridzuan bin Yahya	...	34230 share
Kamarulzaman bin Yahya	...	34230 share
Azlan bin Yahya	...	34230 share
Sa'adiah bte Yahya	...	17115 share

These two letters from the kadi's office were dated 8 May 1988 and particularly the first letter clearly showed that Awang bin Ali, referring to the same individual by the name of Awang bin Hj. M. Rambli which herein has been referred to as Awang, was one of the beneficiaries of the estate of Jamaluddin. Awang was therefore a beneficiary of the estate of Jamaluddin and not an administrator of the estate of Sa'adon as set out in the sale and purchase agreement as alluded to in the early part of this judgment. The first letter also showed the defendant to be one of the beneficiaries of the estate of Jamaluddin.

The two letters from the kadi's office were nothing more than a table of succession according to the Shafii school of Mahomedan Law. A book entitled *"The Mahomedan Law of Inheritance, according to the school of Shafii"* written by C.H. Withers Payne, in its preface contained the following passage:

> Mahomedans consider their law of inheritance as founded upon divine revelation; and remembering that it is enjoined in the Hadis: 'Learn the laws of inheritance and teach them to the people, for they are the one half of useful knowledge', their jurists have evolved in the utmost detail and with the greatest ingenuity a system of sound logic if of some intricacy.

Faiz Badruddin Tyabji in his treatise *"Muslim Law"* at p. 800 thereof said:

> The Muslim Law of inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious aim of providing not merely for the selection of a single individual or homogeneous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations.

The learned author continued at p. 801:

> As to the excellence of the system in a formal sense, Sir William Jones said: 'I am strongly disposed to believe that no possible question could occur on the Muhammadan law of succession which might not be rapidly and correctly answered'.

Put in its mildest form, the table of succession cannot go wrong. All the beneficiaries to the estate of Jamaluddin have been allotted their respective shares and this court will give due recognition to it.

The plaintiff through its director one Chong Kwee Sang affirmed an affidavit on 4 September 1997 as reflected in encl. 2 and there he deposed that Awang was the registered proprietor of the said land on 14 December 1993. It was deposed that by way of Form T issued on 14 December 1993 under the Small Estates (Distribution) Act 1955 the whole of the said land was transferred to Awang. The office of the small estate distribution by letter dated 5 January 1994 informed the land administrator, Kota Tinggi, Johore that the hearing of the estate of Jamaluddin had been completed and that Awang could now collect the land title to the said land. It also deposed that Awang had sold the said land to Chai on 2 November 1993 and Chai in turn, by way of a deed of assignment, assigned the said land to the plaintiff on 19 April 1994. Clause 1 of the deed of assignment was worded as follows:

> In consideration of the sum of Ringgit Malaysia One thousand (RM1,000.00) only paid by the assignee (referring to the plaintiff) to the assignor (referring to Chai) (the receipt of which the assignor hereby acknowledges), the assignor (referring to Chai) hereby assigns to the assignee (referring to the plaintiff) all his rights and benefits of the principal agreement (referring to the sale and purchase agreement between Awang and Chai dated November 2, 1993).

and by cl. 3 of the deed of assignment it was stipulated that the balance of the purchase price of RM799,415 shall be paid by the assignee plaintiff to the vendor Awang within three months from the date of issuance of the issue document of title in favour of the vendor Awang. On 11 October 1994 the plaintiff became the registered proprietor of the said land.

The defendant in encl. 5 challenged the transfer of the said land to Awang as reflected in Form T and alleged fraud. It was also deposed that the transfer of the said land to Awang was made without the defendant's knowledge who was, at the material time, one of the beneficiaries to the estate of Jamaluddin. Of pertinence was the averment by the defendant that Awang had been charged with three others for several offences in regard to the said land in the Sessions Court, Johor Bahru on 7 October 1997. A newspaper cutting dated 8 October 1997 from the Utusan Malaysia contains juicy details about those charges in the Sessions Court, Johor Bahru. The charges ranged from s. 4(c) of the Prevention of Corruption Act 1961 (now re-styled and re-named as the Anti-Corruption Act 1997) to ss. 465 and 471 of the Penal Code. The prosecutions for these offences were conducted by the officers of the Anti-Corruption Agency. That newspaper cutting showed Awang smartly dressed and wearing a white skull cap. The plaintiff by way of an affidavit-in-reply affirmed on 11 November 1997 through Chong Kwee Sang in encl. 8 merely denied the defendant's averments in regard to those charges pending before the Sessions Court, Johor Bahru. By way of an additional affidavit affirmed on 6 November 1997 by the defendant in encl. 7, it was categorically stated that the defendant's solicitors Messrs Abdul Razak Ahmad & Associates had filed a summons in the High Court of Johor Bahru against both the plaintiff and

Awang for a declaration that the transfer of the said land from Awang to the plaintiff was null and void and ought to be struck off *ex necessitate rei* (from the necessity of the case).

These were the facts as seen from the various affidavits filed therein. I shall now proceed to the merits of the case.

Has The Defendant A Caveatable Interest To Lodge The Private Caveat On The Said Land And Must The Private Caveat Be Removed?

The facts revealed that the defendant is a beneficiary of the estate of Jamaluddin and for this very reason he certainly has a caveatable interest on the said land by virtue of s. 323 of the National Land Code 1965 ("NLC"). This is my judgment and I so hold accordingly. It must be remembered that not every person can enter a private caveat. The essential requirements under s. 323 of the NLC are as follows: that a person who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest. In the statutory declaration supporting the application for the entry of the private caveat, the defendant deposed briefly that he is one of the beneficiaries of the estate of Jamaluddin and he is informed that Awang as a beneficiary of the estate of Jamaluddin has sold the said land to the plaintiff without the permission or knowledge of the other beneficiaries. For that reason, the defendant deposed that he lodged the private caveat to safeguard his interest as a beneficiary to the said land. Once the registrar is in receipt of the application for the entry of a private caveat, his duty is purely administrative or ministerial (*N. Vangedaselam v. Mahadevan & Anor* [1976] 2 MLJ 161; *Tee Chin Yong v. Earnest Jeff* [1963] 29 MLJ 118, 119; *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224; and *Damodran v. Choe Kuan Hin* [1979] 2 MLJ 267).

The court in *Jit Kaur v. Parl Singh* [1974] 2 MLJ 199 held that a beneficiary who has obtained letters of administration challenging the validity of the transfer has a caveatable interest over the land. Here I am prepared to hold that the defendant as a mere beneficiary of the estate of Jamaluddin and who has not obtained the letters of administration was entitled under s. 323 of the NLC to caveat the said land as the defendant was claiming a right to the title. Must the defendant as a beneficiary of an unadministered estate remain idle and not caveat the said land and simply allow Awang to sell the said land to Chai even though the defendant has a right to the title to the said land? The answer is in the negative. It is against commonsense and justice to deprive the defendant of his right to caveat the said land. In *Mahadevan & Anor v. Patel* [1975] 2 MLJ 207, Suffian LP had this to say of s. 323 of the NLC:

> ... the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat.

Having held that the defendant has a caveatable interest to lodge the private caveat on the said land, the next question to consider would be whether this court should remove the private caveat in favour of the plaintiff. The headnote to the case of *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 CLJ 545; [1995] 1 MLJ 782, a decision of the Court of Appeal, merits reproduction. The headnote reads as follows:

> In order to sustain a caveat, a caveator must first pass through three stages: (i) whether he has disclosed a caveatable interest in his application under section 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

and flowing from this, I have no hesitation to hold that the defendant passed the three stages admirably and, consequently, the private caveat should remain on the register pending the disposal of the summons for declaration which he sought for. I will now proceed to set out the reasons as to why the private caveat should not be removed from the register:

(1) Awang, the purported vendor in the sale and purchase agreement with Chai on 2 November 1993, was not the registered proprietor of the said land. On that date Awang was one of the beneficiaries to the estate of Jamaluddin and that estate comprised the said land.

(2) As a beneficiary to the estate of Jamaluddin, Awang has no capacity in law to enter into an agreement for sale of the said land to Chai. Section 11 of the Contracts Act 1950 enacts that only persons who are "of the age of majority according to the law to which (they are) subject" are competent to contract. Unfortunately, the Contracts Act 1950 is not all encompassing as it does not provide for the effect of an agreement entered into by the parties who are not competent to contract. In the case of *Mohori Bibee v. Dhurmodas Ghose* [1903] 30 Cal. 539, 30 IA 114, the Privy Council held that the effect of ss. 10 and 11 of the Indian Contracts Act, which is in *pari materia* to our ss. 10 and 11 of the Contracts Act 1950, is to render all agreements infected with that kind of incapacity as void. The Malaysian Courts have dutifully followed the Privy Council's decision of *Mohori Bibee* in at least three instances: *Tan Hee Juan By His Next Friend Tan See Bok v. Teh Boon Keat and Lai Soon* [1934] MLJ vol. III 96; *Government of Malaysia v. Gurcharan Singh & Ors* [1971] 1 MLJ 211; and *Leha binte Jusoh v. Awang Johari bin Hashim* [1978] 1 MLJ 202. In *Mohori Bibee (supra)*, his Lordship Sir Ford North after referring to ss. 2, 10 and 11 of the Indian Contracts Act said:

> Looking at these sections, their Lordships are satisfied that the Act makes it essential that all contracting parties should be 'competent to contract', and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. This is clearly borne out by later sections in the Act.

In *Tan Hee Juan By His Next Friend Tan See Bok v. Teh Boon Keat and Lai Soon (supra)*, Hereford J had this to say at p. 96 of the judgment:

> The Privy Council have held that the effect of sections 10 and 11 of the Contracts Act of India is that an infant cannot make a contract within the meaning of the Act, and that a contract made by an infant is not only voidable but void. (*Mohori Bibee v. Dhurmodas Ghose* 30 Calcutta 539). That decision of the Privy Council is binding on this court, and therefore there can be no doubt whatever that those transfers are void. That being so, as the registration of these proprietors has been obtained by a void instrument, the effect of section 42(iii) of the Land Code is that the registration is void, and I have no option or alternative that I know of or can discover but to declare that registration void.

In *Government of Malaysia v. Gurcharan Singh & Ors (supra)*, Chang Min Tat J applied *Mohori Bibee's case (supra)* and held that the contract entered into by the first defendant was void as he was an infant at the relevant time.

In *Leha binte Jusoh v. Awang Johari bin Hashim (supra)*, Ong Hock Sim FJ delivering the judgment of the then Federal Court had this to say at p. 203 of the judgment:

> The Privy Council in *Mohori Bibee v. Dhurmodas Ghose* 30 IA 114 ruled that 'the (Indian Contracts) Act makes it essential that all contracting parties should be competent to contract' and specifically enacts that a person incompetent to contract by reason of infancy cannot make a contract within the meaning of the Act. Our Contracts Act 1950 is in *pari materia* with the Indian Contracts Act (see sections 10 and 11). The learned judge accordingly held, following *Suraj Narain Dube v. Sukhu Aheer & Anor* [1928] All 440, the agreement of March 1, 1952 to be void and no specific performance can be ordered on the agreement as an agreement for sale.
>
> However, he went on to hold that the purchase price having been paid in full and the respondent let into possession, a constructive trust had been created and the deceased held the lands in trust for the respondent. With respect, to import a constructive trust in the present instance and grant a declaration that the appellant as Administratrix of Mat bin Jusoh deceased, held deceased's share as Trustee thereof for and on behalf of respondent and that respondent is entitled to possession of the portions occupied pursuant to the agreement and order such trust to be specifically performed is in effect to enforce an agreement which is void *ab initio*.

No doubt the above mentioned cases revolved on the competency of a minor to enter into a contract but the general principles distilled from these cases are germane and should be used as guidelines. As Lord MacMillan once said in *Birch Brothers Ltd v. Brown* [1931] AC 605 at 631:

> Precedents should be stepping stones and not halting places.

Now, since Awang was not competent to enter into the contract to sell the said land to Chai that contract must therefore be construed as void. This would in turn render the deed of assignment void *ab initio* as well. In *Ruhani binti Mohiat & Anor v. Abdul Karim bin Mat Ali & Anor* [1993] 3 CLJ 524, Lamin bin Hj. Mohd. Yunus J (now President of the Court of Appeal) had to consider the crucial question of whether the plaintiffs had the capacity to sue bearing in mind that the plaintiffs sued as administrators before the extraction of the letters of administration. His Lordship while recognising that (see p. 526 of the report):

> The present suit was filed on 14 March 1985 and on that date, the plaintiffs therefore, lacked the capacity to sue as administrators because the letters of administration was only extracted on 6 May 1991.

proceeded to hold as follows (see the headnote thereof):

> The plaintiffs had capacity to sue as administrators of the deceased, as the letters of administration had already been granted to them before the date of the filing of the suit. A person is vested with the power to administer the estate of the deceased from the date an order granting him the letters of administration is made on an application by way of petition as required under Order 11 rule 5(1) of the Rules of the High Court 1980. The word 'administrator' under section 2 of the Probate and Administration Act 1959 (the Act) means 'a person to whom administration is granted'. Furthermore, the granting of letters of administration is not done simply as a matter of course. The court is vested with discretionary powers under section 30 of the Act. Rights and liabilities accrue upon the grant being made, as provided by section 31. The extraction of the letters of administration only serves as evidence to the world at large that the person named in the grant is the administrator of the deceased, the grant taking effect from the date the petition for letters of administration is allowed and the order granted.

In arriving at his decision, his Lordship Lamin Mohd. Yunus J (now President of the Court of Appeal) considered the English case of *Ingal v. Moran* [1944] 1 All ER 97 which laid down the proposition that until the grant of letters of administration has been extracted, the administrators are not clothed with the capacity to sue.

I will now proceed to examine the statutory provisions.

Section 39 of the Probate and Administration Act 1959 (Act 97) enacts as follows:

(1) Where a person dies intestate his movable and immovable property until administration is granted in respect thereof shall vest in the Official Administrator in the same manner and to the same extent as it vests in the Probate Judge in England.

(2) On the making of an order for a grant of administration by the Court all such property shall vest in the administrator.

and it simply means that on the death of a person dying intestate, the property vests in the Official Administrator until administration is granted.

The word "administration" is defined in s. 2 of the Probate and Administration Act 1959 (Act 97) to mean:

> ... with reference to the estate of a deceased person, letters of administration issued by the Court whether general or limited or with the will annexed or otherwise authorizing the person or persons therein named to administer the deceased person's estate in accordance with law.

and when applied to the factual matrix of the present case, Awang must show to this court that he had with him the letters of administration issued by the court authorising him to administer the estate of Jamaluddin in accordance to law. Alas, there was no affidavit evidence forthcoming from Awang in that direction.

Section 68 of the Probate and Administration Act 1959 (Act 97) sets out the duties of representatives and it enacts that:

(1) On the death of a person intestate as to any property, the property shall be held by his personal representatives –

(a) as to the immovable property upon trust, subject to section 60, to sell the same; and

(b) as to the movable property upon trust to call in, sell and convert into money such part thereof as may not consist of money,

with power to postpone the sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale.

(2) Out of the net money to arise from the sale and conversion of the said movable and immovable property (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representatives shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout, and out of the residue of the said money the personal representatives shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased.

(3) During the minority of any beneficiary or the subsistence of any life interest, and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorized by any written law for the investment of trust money, with power, at the discretion of the personal representatives, to change the investments for others of a like nature.

(4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Part referred to as 'the residuary estate of the intestate'.

(5) The income (including net rents and profits of immovable property after payment of rates, taxes, costs of insurances, repairs and other outgoings properly attributable to income) of so much of the movable and immovable property of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however the estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman.

(6) Nothing in this section affects the rights of any creditor of the deceased or the rights of the Government in respect of estate duty.

(7) Where the deceased leaves a will, this section has effect subject to the will.

A "personal representative" is defined in s. 2 of the Probate and Administration Act 1959 (Act 97) to mean, *inter alia*, the administrator for the time being of a deceased person.

Flowing from these statutory provisions, an examination as to the effect of a contract of sale entered into by an administrator (which is defined in s. 2 of the Probate and Administration Act 1959 (Act 97) as a person to whom administration is granted) before a letter of administration has been granted brings to the forefront the case of *Noordin bin Mat Dom v. Yahaya bin Mohamed Jalit* [1952] 18 MLJ 17. That case was decided by Thomson J in his original civil jurisdiction and it turned on the construction of a 1944 agreement. Thomson J had this to say at p. 18 of the judgment:

> And in the third place, I am satisfied that the agreement was made by the defendant not in his capacity as administrator of the estate of his deceased father but in his personal capacity. I base that conclusion on the provision that transfer was to take place when administration was completed and "then only". If the defendant was contracting in his capacity as administrator that provision would be completely meaningless, if indeed it did not reduce the whole agreement to so much nonsense, for it would mean that he was contracting to do something only when, from a legal point of view, he had ceased to exist.

> Having arrived at these results, I have no hesitation in saying that the true effect of the 1944 Agreement was that the defendant in his personal capacity agreed to sell the land comprised in Lot 1954 to the plaintiff. That, to my mind, is the plain and obvious meaning of the words of the agreement itself.

Applying the case of *Noordin bin Mat Dom v. Yahaya bin Mohamed Jalit (supra)*, could Awang be said to have entered into a sale and purchase agreement with Chai to sell the said land in his personal capacity? The answer would be in the negative. For fear of repetition, the agreement for sale dated 2 November 1993 described Awang as an administrator of the estate of Sa'adon although in actual fact he was merely one of the beneficiaries of the estate of Jamaluddin. As a beneficiary of that estate he had no *locus standi* or capacity to sell the said land to Chai. Awang too had no competency to sell the said land in his personal capacity. Looking at the "Special Condition" of the agreement for sale, it is not an unreasonable construction of that agreement for this court to come to those conclusions. In my judgment, Awang was not the administrator of the estate of Jamaluddin nor the administrator of the estate of Sa'adon when he entered the 2 November 1993 agreement. Even if Awang was the administrator of these estates (which was not the case here), he could not contract to sell the said land to Chai without the permission of the court. I am fortified in my view by the decision of *Haji Saud v. Hj. Ahmad & Anor* [1957] 23 MLJ 50 where Mathew CJ delivering the judgment of the Court of Appeal with whom Whyatt CJ (S) and Rigby J concurred, said at p. 51 of the judgment:

> Agreements for sale of land can be entered into by administrators, but the transfer of the land in question and the registering of the purchaser cannot be effected until the permission of the Court has first been obtained.

(3) Reference to Das on the Torrens System in Malaya at p. 324 is appropriate. The learned author approaches the question of the right of a caveator to lodge a caveat by posing two pertinent questions: Are the rights of the person lodging a caveat capable of being enforced by (a) specific performance or (b) be protected by an interim injunction? The learned author then proceeds to quote the following passage from Hogg on the Australian Torrens System (1905) at p. 1039:

> The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens System suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the courts.

and in the context of the defendant caveator he certainly has that right to enter the caveat on the said land. As a beneficiary to the estate of Jamaluddin it cannot be doubted that the defendant caveator has rightly exercised his statutory right to lodge that private caveat. The circumstances itemised in the statutory declaration of the defendant would also justify the grant of an injunction if that was sought by the defendant.

As a beneficiary, the defendant can rightly be called equity's protege (*Abigail v. Lapin* [1934] 51 CLR 58) and the defendant's priority is said to be unimpeachable. But if the defendant has acted in such a way "by conduct, by representations, by mis-statements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title" then he will lose priority (*Shropshire Union Railways v. R* [1875] LR 7 HL 496, per Lord Cairns LC at p. 509) but the defendant has not done any of those things to disentitle him to his rightful share to the said land. There were other lawful beneficiaries to the said land and in my judgment they too take priority over the plaintiff to the said land.

(4) The plaintiff purchased the said land by way of an assignment of the sale and purchase agreement dated 2 November 1993. The plaintiff must therefore be imputed to know the "terms and conditions" of the agreement dated 2 November 1993 as cl. 1 of the deed of assignment assigned to the plaintiff all the "rights and benefits of the principal agreement". Equity imposed on the plaintiff a high standard of diligence to make all those necessary searches which a prudent purchaser would do. From the agreement dated 2 November 1993 the plaintiff knew that Awang was not the administrator of the estate of Sa'adon as the letters of administration had yet to be extracted. There was a failure on the plaintiff's part to exercise that high standard of diligence and that dismal failure would render the plaintiff affected by notice – not only actual but also constructive notice. The plaintiff too would be affected by implied or imputed notice of the position of Awang on 2 November 1993. As a purchaser of the said land by way of an assignment the plaintiff had a duty to investigate the title and Lord Selbourne in *Agra Bank v. Barry* [1874] LR 7 HL 135 at p. 157 described that onerous duty in these words:

> It is merely the course of which a man dealing *bona fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bona fide* dealings, to avoid knowledge of the true state of the title.

There was no affidavit evidence emanating from the plaintiff to show that the plaintiff had in fact investigated the title to the said land. In the absence of that kind of affidavit evidence the plaintiff must have acted by design "to avoid

knowledge of the true state of the title" of the said land. For fear of repetition in encl. 5, the defendant challenged Form T which purportedly gave title to Awang. The Anti-Corruption Agency too have stepped in and charged Awang and his accomplices for various offences in the Sessions Court at Johor Bahru. The rationale for the priority rule rests traditionally on fraud. The defendant alleged fraud in encl. 5. It must be borne in mind that the court would grant relief to a party injured by another's fraud. The court would certainly grant relief where the conscience of the defaulting party demands it. It has been said time and again that equity has a general jurisdiction to relieve against equitable fraud which can be:

> ... presumed from the circumstances and conditions of the parties contracting ... to prevent taking surreptitious advantage of the weakness and necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other (*Earl of Chesterfield v. Janssen* [1751] 2 Ves Sen 125; 28 ER 82).

(5) A caveat is nothing more than the "means devised for the protection of the right of the claimant pending proceedings in a competent court to enforce" the claim to an interest in land (see the speech of Griffith CJ in *Barry v. Heider And Another* [1914] 19 CLR 197 particularly at p. 207). Syed Agil Barakbah J in *Damodaran v. Vasudeva* [1974] 1 MLJ 128 particularly at p. 129 described the function of a caveat in these words:

> ... to suspend the process of registration until conflicting claims have been settled. It is a unilateral act and no person can create rights in his own favour nor enlarge or add to his existing proprietary rights by means of a caveat. The effect of a private caveat under the National Land Code is to prohibit the registration, endorsement or entry on the register of the document of title pertaining to any dealing with the land in dispute so long as the caveat continues in force.

As a beneficiary to the estate of Jamaluddin the defendant was entitled in law to caveat the said land notwithstanding the fact that the plaintiff has been registered as the proprietor of the said land. The defendant's caveat should remain on the register pending the disposal of the summons which the defendant had filed against the plaintiff and Awang seeking the declaration that the transfer of the said land from Awang to the plaintiff was null and void and ought to be struck off. In my judgment, the effect of the caveat on the said land would allow the court to adjudicate on the rival claims of the parties and, if the justice of the case requires, to remove the plaintiff from the register and substitute it with the deserving party – whoever that party may be or for that matter to let the plaintiff remain on the register as the justice of the case requires. That can only be done after the disposal of the summons seeking the declaration which the defendant sought from the court. I am constrained to hold that the defendant:

(a) had a caveatable interest to lodge the private caveat;

(b) and the affidavit evidence disclosed a serious question to be tried;

(c) and, finally, the balance of convenience or the justice of the case favoured the private caveat to remain on the register pending the disposal of the summons.

Under s. 322(2) of the NLC, the effect of a private caveat is simply to prohibit the registration or entry on the register document of title of any dealing in the land. Thus, once a private caveat has been lodged the prohibitory aspect of that private caveat cannot be overlooked. Griffith CJ in *Butler v. Fairclough and Another* [1917] 23 CLR 78 said at p. 91 of the judgment that a caveat:

> operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat.

and this very passage received the approval of the Privy Council in *Abigail v. Lapin* [1934] AC 491, especially at p. 502. In *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 PC, Lord Diplock succinctly said at p. 214 of the judgment:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law.

I gratefully adopt the speech of Lord Diplock in *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44 at p. 46 to be the purpose of a caveat and there his Lordship said elegantly that it was:

> ... to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.

(6) On the facts, Awang had committed fraud when he obtained the order from the Kota Tinggi land office in Form T to transfer the said land to him wholly. As to whether the court would revoke or set aside the order as seen in Form T that would be done, if at all, after the summons had been disposed of by the court. It is too premature at this juncture to dwell at length as to the order in Form T. Be that as it may, the court on the authority of *Faridah bte Mat Akir & Anor v. Sharifah binti Haji Ahmad & Ors* [1976] 1 MLJ 30 certainly has the jurisdiction to revoke or set aside the order of a tribunal over whom the court has superior jurisdiction and control particularly so when it was based on fraud.

Removal Of The Private Caveat By The Court

I will now proceed to examine whether the plaintiff falls squarely within s. 327 of the NLC to entitle them to remove the private caveat. It is now trite law that where a private caveat has not been withdrawn by the caveator or when it has not lapsed after six years, the NLC provides two methods for its removal. The first would be by way of an application to the registrar to remove the private caveat and the second is by way of an application to the court for its removal. Under s. 326 of the NLC, any person or body whose land or interest is tied down by a private caveat may at any time apply to the registrar for its removal. Persons or bodies who do not fall within the category of persons or bodies as stipulated in s. 326 of the NLC but nevertheless are "aggrieved by the existence of a private caveat" may apply to the courts for the removal of that caveat under s. 327 of the NLC. I am constrained to say that a registered proprietor who wishes to remove a private caveat entered by a purchaser or any other person may either apply under s. 326 of the NLC to the registrar or under s. 327 of the NLC to the courts, whereas a purchaser pending registration who wishes to remove a private caveat entered by another person, can do so by applying to the courts for its removal under s. 327 of the NLC. A classic example would be the case of *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin (f)* [1984] 1 MLJ 160 FC where there was an application for removal by a purchaser of a caveat entered into by a subsequent purchaser. Lord Diplock had occasion to consider the differences between these two methods of removal of a private caveat in the case of *Eng Mee Yong & Ors v. Letchumanan (supra),* particularly at p. 215 of the judgment where his Lordship lucidly said:

> Whereas the procedure under section 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the Court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat – typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered.

The onus of proof is entirely on the caveator, in this instance the defendant, to satisfy the court that the private caveat should remain on the register. That this is so is amplified by the case of *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145 FC where Suffian FJ speaking for the then Federal Court said at p. 146 of the judgment:

> I am of the opinion that it is for the caveator to satisfy the Court that it is just for the caveat to remain. I say so because, first, as between the proprietor and the caveator, the proprietor is in a superior position; secondly, because the fact that the caveat has been entered on the register does not necessarily mean that the caveator's claim to restrain the proprietor's dealings with the land is necessarily valid in view of subsection (1) of section 324.

It is interesting to note that six years later, the then Federal Court in *Kasivisvanathan Chettiar v. Pereira* [1976] 2 MLJ 110 FC ruled that in an action for the removal of a private caveat under s. 327 of the NLC, the caveator need not have to prove, at all, that he has a good claim to a registerable interest in the land provided the caveator had already filed a suit against the caveatee to advance his claim in court and that the caveator need only prove and discharge his onus at the trial proper. Likewise here the defendant as the caveator need only prove that he has a good claim to a registrable interest in the said land at the trial of the summons. But it is germane to point out that Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan (supra)* criticised *Nanyang Development* and *Kasivisvanathan Chettiar* and expounded the following test as seen at p. 215 of the judgment:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

The test may be re-phrased in this manner:

> Whether on the evidence presented to the Court, the caveator has shown that there is a serious question to be tried with regard to his claim to the property and if so, whether he has shown that on the balance of convenience, it would be better for the *status quo* to be maintained until the trial of the action and allowing the caveat to remain on the register?

This very test was repeated by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713; [1995] 1 MLJ 719 and applied once again by the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook (supra)* in a style of its own of which I am bound. Mr. Abdul Razak Ahmad, the learned counsel for the defendant caveator, argued with style and gusto that there was no contract subsisting between Awang and Chai for the simple reason that Awang was not competent to contract for the sale of the said land to Chai. Mr. Abdul Razak Ahmad further submitted that Chai could not assign the contract dated 2 November 1993 to the plaintiff because that very contract was bad in law. He argued that a void contract could not be assigned to anyone and, consequently, it was argued that the plaintiff was not aggrieved by the existence of that private caveat. Mr. Tho Kam Chew, an equally learned counsel for the plaintiff, argued to the contrary and it was his stand that the plaintiff was a *bona fide* purchaser for value without notice of any fraud. Mr. Tho Kam Chew linked up this argument with the argument that the defendant as a beneficiary to the estate of Jamaluddin which was not fully administered had no caveatable interest to protect and therefore could not lodge that private caveat. The then Federal

Court in *Lee Ah Thaw & Anor v. Lee Chun Tek* [1978] 1 MLJ 173 held that the appellants as residuary beneficiaries did not have a caveatable interest in the lands since the administration of the estate was incomplete and the residue unascertained. Lee Hun Hoe CJ Borneo delivering the judgment of the then Federal Court at p. 175 to p. 176 of the judgment had this to say:

> The contention of appellants that they have caveatable 'interest' in the property of the testator's estate because they are the beneficiaries and entitled to the residue of the estate cannot be supported since the administration has not been completed. If, by their contention, they mean that they have certain equitable interest in any specific asset while the administration is incomplete then such contention would be in conflict with such high authorities as *Lord Sudeley & Others v. The Attorney-General* [1897] AC 11; *Dr. Barnardo's Homes National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts* [1921] 2 AC 1; and *Commissioner of Stamp Duties v. Livingston* [1964] 3 All ER 692.

Further down the same page of the same judgment his Lordship Lee Hun Hoe CJ Borneo continued in serious vein:

> They claimed to have beneficial interest as residuary beneficiaries under the testator's will. It seems to me that the title of a beneficiary claiming the property of a deceased person, whether as devisee, legatee or next-of-kin, is not complete without some act on the part of deceased's personal representatives in giving effect to the gift or succession. Until such an act occurs a beneficiary has merely an inchoate, but transmissible right. Such an act usually takes the form of an assent or conveyance. See *Re Parson* [1943] Ch. 12. A residuary legatee or devisee, however, has no claim to any of the deceased's estate in specie or to any part of that estate until the residue is ascertained. His right is to have the estate administered properly and then claim for the benefit.

Mr. Tho Kam Chew relied on the above passages to drive home the point that the defendant had no caveatable interest to lodge the private caveat. With respect, the above passages would equally apply to the benefit of the defendant. As I said Awang was not the administrator of the estate of Sa'adon or for that matter not the administrator of the estate of Jamaluddin when he entered into the agreement dated 2 November 1993. In fact, evidence wise, Awang was one of the beneficiaries of the estate of Jamaluddin which was not fully administered and, consequently, he could not sell the said land to Chai. The agreement dated 2 November 1993 being void – a void instrument, it could not be legally assigned by Chai to the plaintiff and Mr. Abdul Razak Ahmad was right when he said that the plaintiff was not aggrieved by the existence of the private caveat (*Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 493; [1997] 3 MLJ 188 FC which followed and applied *Eng Mee Yong & Ors v. Letchumanan (supra)*).

Mohamed Azmi SCJ in *Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 3 CLJ 1340; [1992] 2 MLJ 1 SC, referred to the case of *Lee Ah Thaw & Anor v. Lee Chun Tek (supra)* and the case of *Khoo Teng Seong v. Khoo Teng Peng* [1990] 3 MLJ 37 and concluded at p. 8 of the judgment that:

> In our view, the fact that the caveator was entitled until the will to a one-sixth share in the eight parcels of land, did not mean that his share was ascertainable before administration was complete. As expressed in the deceased's will, the caveator was in fact entitled to only one share, and para 4 of the will empowered the executor to sell and convert any part of the estate in order to pay the testator's debts apart from the funeral and testamentary expenses. As such, until the administration was complete, the value or extent of the residue on which his one-sixth share depended, remained uncertain. On established authorities, clearly the caveator in the present appeal had no caveatable claim or interests in any of the property when the caveat was entered. There was no evidence that the administration of the estate was already complete to ascertain the actual worth of the residue for final distribution. On the facts, there was undoubtedly a trust for conversion and administration was yet to be finalized.

and Mr. Tho Kam Chew relying on the above passages advanced the same arguments as he did when he referred to the case of *Lee Ah Thaw & Anor v. Lee Chun Tek (supra).*

It seemed to me that both the decisions of the then Federal Court in *Lee Ah Thaw & Anor v. Lee Chun Tek (supra)* and the then Supreme Court in Tan *Heng Poh v. Tan Boon Thong & Ors (supra)* curtailed the defendant in that the defendant as a beneficiary of the estate of Jamaluddin which had not been administered had no caveatable interest to lodge the private caveat on the said land. There were two letters from the kadi's office dated 8 May 1988 as alluded to in the early part of this judgment and these two letters showed the list of beneficiaries to the estate of Jamaluddin. These two letters from the kadi's office must have been prepared with a view to extract the letters of administration but until that is done the defendant as "a beneficiary has merely an inchoate, but transmissible right" borrowing the words of Lee Hun Hoe CJ (Borneo) in *Lee Ah Thaw & Anor v. Lee Chun Tek (supra*). I must at once state that though Lee Hun Hoe CJ (Borneo) in *Lee Ah Thaw & Anor v. Lee Chun Tek (supra)* considered the decision of Suffian LP in *Mahadevan & Anor v. Patel (supra)* yet Lee Hun Hoe CJ (Borneo) declined to follow it as he felt that the facts in *Mahadevan & Anor v. Patel (supra)* were different from that of *Lee Ah Thaw & Anor v. Lee Chun Tek (supra)*. With respect, the principle of law enunciated by Suffian LP in *Mahadevan & Anor v. Patel (supra)* was in accord with s. 323(1)(a) of the NLC in that "it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat." That would be the law of this country. The

defendant at the worst was only claiming a right to such title and it was sufficient for him to lodge that private caveat on the said land. There is nothing in s. 323(1)(a) of the NLC that would prevent the defendant as a beneficiary of an unadministered estate from lodging the private caveat and I am not prepared to read words into s. 323(1)(a) of the NLC as to curtail an individual like the defendant from lodging the private caveat. The principle of law enunciated by Suffian LP in *Mahadevan & Anor v. Patel (supra)* are binding on me and I would vigorously apply to the factual matrix of the present case as it accords with commonsense and in line with s. 323(1)(a) of the NLC. It is my judgment and I hold accordingly that the defendant had a caveatable interest and he fulfilled all the three stages as enunciated by the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook (supra).*

Reverting back to the submission of Mr. Tho Kam Chew that the plaintiff was a *bona fide* purchaser for value without notice of any fraud, a repetition of the facts would do some good. It must be recalled that the whole of the agreement dated 2 November 1993 was assigned to the plaintiff by way of a deed of assignment. The plaintiff must be imputed to know the terms and conditions of the agreement dated 2 November 1993 particularly the fact that Awang was not an administrator of the estate of Jamaluddin but rather was one of the beneficiaries, just like the defendant, of the estate of Jamaluddin. The plaintiff therefore cannot be described as a *bona fide* purchaser for value without notice of any fraud as he must be deemed to know the detailed background of the said land. The solicitor for the plaintiff in the preparation of the deed of assignment was Messrs Lam & Lim. Before the plaintiff entered into that deed of assignment assigning the whole chunk of the agreement dated 2 November 1993 to the plaintiff, Messrs Lam & Lim must have made a search at the state registry to investigate Awang's title. The plaintiff has an inherent right to insist on a search being conducted before payment of the purchase price (*Chow Yoong Hong v. Tai Chet Siang* [1960] 26 MLJ 130). Messrs Lam & Lim was also duty bound to conduct a search for the plaintiff (*Neogh Soo Oh & Ors v. G. Rethinasamy* [1983] 2 CLJ 218; [1984] 1 MLJ 126). The search at the state land registry would be to determine whether Awang's title was free from encumbrances. The search was particularly useful and should have been done by Messrs Lam & Lim as Awang was described in the agreement dated 2 November 1993 as an administrator of the estate of Sa'adon and the special condition referred to the letters of administration that had to be obtained. Messrs Lam & Lim must be satisfied on the authenticity of the search and they would then advice the plaintiff accordingly. There was no affidavit evidence emanating from Messrs Lam & Lim to show that a search at the state land registry had been conducted. In *Neogh Soo Oh & Ors v. G. Rethinasamy (supra),* Gunn Chit Tuan J spoke of the duty of the defendant as an advocate and solicitor who failed to use reasonable care and skill in giving his advice to the plaintiffs in the sale and purchase of a piece

of land. The defendant did not deny in his defence that advice on the land acquisition factor lay within the scope of the defendant's duties as solicitor to the plaintiffs. The evidence revealed that the defendant did not make a search at or enquiry with the Collector of Land Revenue in the land office at Bukit Mertajam. The defendant too was not aware of the gazette notification to acquire the land intended to be purchased by the plaintiffs. In a well written judgment his Lordship Gunn Chit Tuan J had this to say of the law as seen at p. 129 of the judgment:

> It is clear and settled law that a client of a solicitor may bring an action against him in contract, based on the retainer of the solicitor by the client, or in tort, or in both (*Nocton v. Lord Ashburton* (1914–15) All ER 45, 54 and the *Midland Bank Trust Company Limited* case [1978] 3 All ER 571, 582, and 611). As regards the obligations arising out of the retainer, a solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand. The standard of care is that of the reasonably competent solicitor and the duty is directly related to the confines of the retainer. The exact scope of the solicitor's duty to protect his client's interest is difficult to define but according to Scott LJ in *Groom v. Crocker* [1938] 2 All ER 394, 413, a solicitor should at least 'carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary ...'

This is not the right forum to determine the negligence of Messrs Lam & Lim and I will leave the matter as it stands. But I venture to say that the failure on the part of an advocate and solicitor, applying *Neogh Soo Oh & Ors v. G. Rethinasamy (supra)* vigorously, to make the necessary search may amount to negligence.

Next, the defendant relied on s. 340(2)(b) of the NLC to challenge the plaintiff's title. That section reads as follows:

> 340(2) The title or interest of any such person or body shall not be indefeasible–
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;

As I see it, the defendant mounted an attack against the instrument of transfer rather than the registration itself. This was indeed a serious matter which went into the root of the matter. The NLC is totally silent and do not define the words "insufficient or void instrument." An example of a void instrument can be found in the case of *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No: 2)* [1988] 3 MLJ 352. There the court had to consider the effect of registration of a charge which was in breach of the express restriction in title imposed by s. 120 of the NLC where the sanction

of the state authority was necessary to effect the charge. In fact the sanction was given some five years after registration of the charge. The chargor defaulted and the chargee took steps and obtained an order for sale and the land was sold. The chargor then applied to have the sale set aside on the ground of a breach of s. 120 of the NLC. Edgar Joseph Jr. J (now senior FCJ) granted the application and this was what his Lordship said at p. 356:

> In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of section 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (section 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted *ultra vires* the powers conferred upon him: section 340(2)(c).

Further down the same page of the same judgment, his Lordship continued:

> In the result, the chargor is entitled to the declaration prayed for; namely, that the order for sale aforesaid, in so far as it relates to the land be set aside, the registration of the charge having been procured in breach of the Code and I so order.

The Privy Council in the leading case of *Frazer v. Walker* [1967] 1 AC 569 conclusively decided that registration obtained even by means of a void instrument conferred immediate indefeasibility on the registered proprietor. In applying *Frazer v. Walker (supra)*, which was an appeal from New Zealand, one must always remember that we have our own s. 340(2)(b) of the NLC which expressly provides that the title of the registered proprietor whose registration was obtained by means of an insufficient or void instrument shall not be indefeasible. This was what happened to the plaintiff who got onto the register by means of an insufficient or void instrument. The balance of convenience or the justice of the case favoured the defendant. The private caveat should remain on the register pending the disposal of the summons. This was my judgment and I so hold accordingly. For these reasons, encl. 3 was dismissed with costs.